Supreme Court, U.S.
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No. 05-1386

IN THE

Supreme Court of the United States

KATHLEEN SEMIEN,

Petitioner

v.

LIFE INSURANCE COMPANY OF NORTH AMERICA, a CIGNA COMPANY, and BP LONG TERM DISABILITY (LTD) PLAN,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Mark D. DeBofsky
Counsel of Record
Daley, DeBofsky & Bryant
Suite 2440
55 W. Monroe Street
Chicago, Illinois 60603
(312) 372-5200
Counsel for Petitioner

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REPLY TO BRIEF IN OPPOSITION

ARGUMENT

Respondents' primary assertion is that Kathleen Semien's Petition for Certiorari should be denied because the question presented, "properly understood," was "squarely answered" by this Court in *Firestone* [*Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989)] and "followed faithfully" by the courts below. Brief Opp. at 9. Respondents are fundamentally mistaken. To be sure, *Firestone* addressed and settled the law under ERISA about the appropriate standard of review to be applied in a benefit claim brought pursuant to 29 U.S.C. §1132(a)(1)(B). But *Firestone* never limited the scope of the evidence and procedures available under the arbitrary and capricious standard as respondents maintain. [1]

Respondents' argument is also inconsistent with *Firestone's* reliance on principles of trust law. Petitioner has already established that discovery and evidentiary hearings were common in insurance disputes involving employee benefits prior to ERISA's enactment. Pet. at 15-16. Such procedures are also permitted in trust disputes even where a deferential standard of review applies. Pet. at 16. Respondents offered no response. Nor have respondents directly challenged petitioner's contention that ERISA's legislative history demonstrates Congress's intent to provide

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[1] The recent *en banc* ruling of the Ninth Circuit in *Abatie v. Alta Health & Life Ins. Co.,* 2006 U.S.App.LEXIS 20829 (9th Cir. August 15, 2006) further undermines respondents' contentions with respect to *Firestone* where the plan administrator, such as the insurer in this case, operates under a conflict of interest. In direct conflict with the Seventh Circuit's ruling here, *Abatie* relied on *Firestone* as the basis for its ruling that claimants have a right to undertake discovery without the need to make a threshold showing of bias.

benefit claimants with the same panoply of procedural and evidentiary rights that litigants receive in other civil disputes. Pet. at 12-15.

Consequently, the *Firestone* ruling was not the source of constraints that have been placed upon the scope of ERISA claim litigation. Instead, the courts of appeals have transformed ERISA's "full and fair" claim review requirement (29 U.S.C. § 1133(2)) into the equivalent of a proceeding before an administrative agency. That analogy is entirely misplaced (Pet. at 21-23), however, and was rejected both by *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 332 (7th Cir. 2005)(citing *Firestone*) and by *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1564 n.7 (11th Cir. 1990) which explained why the use of the arbitrary and capricious standard of review familiar from administrative law should not transform private party litigation under ERISA into a quasi-administrative review proceeding:

> Because we have restated the standard as arbitrary and capricious, the temptation exists to consult precedent regarding the use of that standard to review administrative agency decisions [citations omitted]. We express caution, however, at wholesale importation of administrative agency concepts into the review of ERISA fiduciary decisions. Use of the administrative agency analogy may, ironically, give too much deference to ERISA fiduciaries. Decisions in the ERISA context involve the interpretation of contractual entitlements; they "are not discretionary in the sense, familiar from administrative law, of decisions that make policy under a broad grant of delegated powers." Van Boxel [*v.*

Journal Co. Employees Pension Trust], 836 F.2d [1048] at 1050 [(7th Cir. 1987)].

Of at least equal importance is that ERISA claims are often determined by lay persons who lack the expertise to evaluate competing medical opinions and may simply accept without question the findings made by the plan's consultants, as the Seventh Circuit noted in *Ramsey v. Hercules, Inc.*, 77 F.3d 199, 205 (7th Cir. 1996) and the Third Circuit in *Luby v. Teamsters Health, Welfare and Pension Trust Funds*, 944 F.2d 1176, 1183 (3d Cir. 1991). Nor are plan administrators "unbiased fact finders like the courts." *Id.* Likewise, ERISA claimants lack the "procedural protections that stem from the Constitution and individual statutes" provided in administrative claims. *Id.*

Thus, whether the accuracy and reliability of the evidence presented was knowledgeably considered, or instead, was ignored or overlooked, is crucial in determining whether a benefit denial is arbitrary and capricious. *See, Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insur.Co.*, 463 U.S. 29 (1983).[2] Without the availability of discovery, a court has no means of evaluating whether a benefit claim was truly given a "genuine evaluation." Br. in Opp. at 17.

Finally, respondents' contention that certiorari should be denied on the ground that Semien's case would turn out the same even if she obtained relief from this Court (Brief

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[2] *Also see,* Langbein, "Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA" (Northwestern University Law Review, Vol. 101, 2007)(Available at www.ssrn.com at ssrn-id917610.pdf) at 44: "Plan terms lowering the standard of review undermine the effectiveness of ERISA's requirement of fairness in internal proceedings, by making it so much harder to challenge unfairness."

Opp. at 19-20) is meritless for two reasons. First, the district court acknowledged, based on the existing record, that "there is certainly evidence within the record that would support a contrary result, one in Semien's favor..." Pet.App. 27a. The presence of such genuine issues of material fact would naturally preclude summary judgment. *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The district court's denial of discovery also renders premature a conclusion that the case would turn out the same under a *de novo* standard.

Second, respondents have mischaracterized the evidentiary record. While it is true that some of Semien's physicians released her to return to work because of medical improvement in certain areas (Brief Opp. at 4), the evidence demonstrated a significant worsening in Semien's spinal and psychiatric conditions at the time benefits were withdrawn. Pet.App. 3a, 22a, 23a. To borrow a metaphor from a recent Ninth Circuit opinion involving an analogous situation in a disability benefit dispute:

> UNUM's position throughout this litigation has been that a vehicle would be suitable to drive in the months after its faulty transmission had been replaced, notwithstanding serious and credible signs pointing to the fact that the steering wheel was defective and the brakes were about to fail.

Silver v. Exec. Car Leasing Long-Term Disability Plan, 2006 U.S. App. LEXIS 20153 *20 (9th Cir. 2006). Thus, if the court were to allow discovery or conduct an evidentiary hearing to assess the "quality and quantity of the medical evidence and the opinions on both sides of the issue," (*McDonald v. Western-Southern Life Ins. Co.*, 347 F.3d 161,

172 (6th Cir. 2003)), a standard that even respondents deem "correct" (Brief Opp. at 12), a different outcome than the one reached by the lower courts is a likelihood, not a mere possibility.

Ultimately, the issue presented by the petition for certiorari is whether the Seventh Circuit correctly determined it lacked "statutory authority" to provide a "full review" of Kathleen Semien's disability benefit claim. Pet.App. 18a. Petitioner maintains the lower court applied the wrong paradigm, one that elevated expediency and efficiency over Congress' intent that ERISA claimants receive meaningful access to the federal courts. *See,* 29 U.S.C. § 1001(b). Accordingly, granting Kathleen Semien's petition is necessary to rectify the Seventh Circuit's validation of a regime that is tantamount to a rubber stamp process resulting in the unjust denial of employee benefit claims.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Mark D. DeBofsky
Counsel of Record
Daley, DeBofsky & Bryant
Suite 2440
55 W. Monroe St.
Chicago, Illinois 60603
(312) 372-5200

Counsel for Petitioner